

Supreme Court, U. S.
FILED

JAN 11 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-796

INTERNATIONAL UNION, UNITED MINE WORKERS OF
AMERICA, et al.,

Petitioners

v.

CEDAR COAL COMPANY and SOUTHERN OHIO COAL
COMPANY,

Respondents

**On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit**

PETITIONERS' REPLY

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January 9, 1978



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PETITIONER'S REPLY

1. *Additional Authority.* Since the preparation of the Petition, the U. S. Court of Appeals for the Seventh Circuit in *Zeigler Coal Co. v. Local 1870, UMW*, 96 LRRM 3360, 3362-2, (No. 76-2113, Dec. 1- 1977) followed the positions of the Sixth Circuit stated in *Southern Ohio Coal Co., UMW*, 551 F.2d 703, 715 (1977), cert. denied 46 USLW 3219 (October 4, 1977), and of the Third Circuit stated in *U. S. Steel v. UMW*, 548 F.2d 67, 73 (1976), cert. denied 45 USLW 2318 (June 13, 1977), discussed at pages 13-14 of the Petition. The rationale of the *Ziegler* decision is virtually identical to the rationale adopted by those two circuits, and is not repeated here.

2. *Review of the question of the availability of injunctive relief raised in Respondents' brief, and not in the Petition, is improper because: (i) the issue was not raised by a timely petition for certiorari, and (ii) the record is totally inadequate for review of that interlocutory question.*

Petitioners seek certiorari solely for review of the directive of the Court of Appeals found in part IX of its opinion (A-40 to A-41) to arbitrate the picket line question as a prelude to trial of the strike damages question. See Petition pp. 1, 4, 6, esp. 4. The Petition does not seek review of any questions relating to injunctive relief. Those questions were discussed separately in part X of the opinion of the Court of Appeals (A-31 to A-40).

Both the damage and injunction issues are undeniably interlocutory. Petitioners justify review of the interlocutory damage question because the challenged portion of the opinion of the Court of Appeals will have a substantial and erroneous impact on the administration of justice. See Petition, item III, pp. 15-16. Respondents neither acknowledge the interlocutory nature of the question they improperly attempt to raise, nor suggest any justification for review at this stage of the proceedings.

The record is totally inadequate for review of the interlocutory questions posed by Respondents. Review of the injunction question is particularly inappropriate in the absence of any finding of fact as to what issue the pickets were promoting or, as to the Cedar Coal case,¹

¹As was done in the Petition, Petitioners at times will refer to themselves as the "unions", to the Respondents as the "coal operators" and to the two cases for which certiorari is sought as the "Cedar Coal case" and the "Southern Ohio case" (per note 1 at p. 2 of the Petition). A third case involving Cedar Coal and Local 1759, discussed by Respondents, is mentioned at note 2 p. 3 of the Petition, but is not discussed herein as certiorari is not sought as to any issue in that case. See notes 26 & 27 at p. 15 of the Petition.

any ruling as to why miners would not cross the picket lines.² The central and crucial factual premise of the Respondent coal operators arguments—that the stoppages which spread from the original coal mine to other mines were an attempt to settle the original arbitrable dispute³—was never the subject of any findings of fact and is supported only by Respondents' affidavits and argument and not by any reviewable fact findings. Petitioners have consistently and emphatically disputed causes of the stoppages in both the Cedar Coal and Southern Ohio cases.

Respondents' "brief" is an untimely and improper independent petition for certiorari. Respondents attack a portion of the opinion of the Court of Appeals not challenged by the Petition. Respondents do not argue for or against Petitioner's position. Respondents arguments amount, instead, to a completely new position which could have been, but was not, presented by a timely⁴ petition, cross-petition, or conditional petition

²Even the informal interlocutory finding, made for the purpose of denying the coal operator's motion for a preliminary injunction in the Southern Ohio case, did not specify why the miners represented by Local 1949 when confronted with stranger picket lines did not work. The District Court ruled that the miners did not cross the picket lines "perhaps from fear or perhaps from exercise of a right not to cross picket lines, or perhaps for other reasons . . ." A-13.

³See Respondents' Brief: p. 2, second full paragraph; p. 3, second full paragraph; p. 5, third full paragraph; p. 7, last three lines; p. 8, item E.

⁴Although Respondents were obviously aggrieved by the ruling of the Court of Appeals that the stoppage in the Cedar Coal case was not enjoinable (A-40), they did not petition for rehearing of that, or any other, question. Neither party sought an extension of the ninety day period for filing of a petition established by 28 USC 2101(c). That period expired December 7, 1977, ninety days after the union's petition for rehearing was denied by the Court of Appeals on or about September 6, 1977. Respondents filed their brief on or about January 4, 1978.

for certiorari. Stern & Gressman, *Supreme Court Practice* § 6.44, p. 310 (4th ed., 1969); 1 *West's Federal Practice Forms, Supreme Court*, 668 (Boskey ed., 1969). It is respectfully submitted that the new and completely separate issue raised in Respondents' Brief should not be considered because it was not raised by a timely petition. See *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 109 n. 4 (1974); *Alaska Industrial Board v. Chugach Assn.*, 356 U.S. 320, 325 (1958); Stern, *supra*, at 315, Boskey, *supra*, at 612.

The title of Respondents' Brief, "in support of . . ." the Petition, is misleading. The Respondent-Coal Operators do not actively urge granting of certiorari on the question framed by the Petitioner-Unions. The parties are unquestionably in sharp disagreement over the separate issue of the availability of injunctive relief raised by Respondents.⁵ Furthermore the device of using Respondents' brief to raise an entirely new issue denies Petitioners any effective opportunity to fully respond.⁶

⁵The unions believe, in part for the reasons stated by the Third and Sixth Circuits and most recently by the Seventh Circuit, see p. 1 *supra*, and pp. 13-14 of the Petition, that the Court of Appeals for the Fourth Circuit correctly upheld the denial of injunctive relief. The coal operators disagree for the reasons stated in their Brief.

⁶This is particularly true as to the effect of the arguments made by amicus-BCOA which complement and expand Respondents' position. Petitioner has no meaningful opportunity to respond to the expansive factual assertions made by amicus, many of which are either incorrect, entirely outside the record, or both. In particular, the premise of the amicus brief—that the stoppage spread in an attempt to force the settlement of an arbitrable issue (see BCOA brief pp. 9, 13, 14, 15, 20, 23, especially 22)—is not supported by any fact findings and is flatly denied by petitioners. See text at note 3, *supra*.

CONCLUSION

For the uncontroverted reasons stated in the original Petition, Petitioners respectfully pray that certiorari be granted and the Court review the issue framed by the Petition.

Respectfully submitted,

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